

STATE OF MICHIGAN
COURT OF APPEALS

MARC S. HERSCHFUS,

Plaintiff/Counterdefendant-
Appellant,

v

TONYA L. HERSCHFUS,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

July 22, 2004

No. 252217

Oakland Circuit Court

Family Division

LC No. 2002-665043-DM

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm.

Plaintiff's first issue on appeal is that the trial court erred in failing to award plaintiff a credit for monetary advancements made to defendant during the pendency of the divorce action. This Court reviews a trial court's factual findings in a divorce action for clear error. *McNamara v Horner*, 249 Mich App 177, 182; 642 NW2d 385 (2002). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* If a trial court's factual findings are upheld, this Court proceeds to determine whether the dispositional ruling of the court was fair and equitable in light of its factual determinations. *Id.* at 183. "A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id.*

Plaintiff contends the trial court erred in failing to award him credit for monetary advancements reserved in interim orders of the court. Plaintiff also asserts the award is inequitable as defendant's one-half interest in the marital portion of the retirement account is increased if credit is not received for the advancements. Plaintiff's reliance upon the language and content of orders entered during the pendency of the litigation is misplaced. MCR 3.205(C)(1). When placing the settlement agreement on the record, the parties did not specifically preserve or incorporate the previous orders regarding the award of a credit to plaintiff. A property settlement agreement can be final and nonmodifiable even before a written judgment of divorce is entered if the agreement was made in open court. MCR 2.507(H). In addition, a property settlement provision that is incorporated into a judgment of divorce is typically final and cannot be modified. *Quade v Quade (On Remand)*, 238 Mich App 222, 226;

604 NW2d 778 (1999). Because plaintiff did not object to the recitation by defendant's counsel regarding the intended manner of distribution of the retirement account and did not specifically indicate an agreement to preserve prior distributions from the account for credit to plaintiff, it was not error for the trial court to construe this as a waiver of the credit. *Nelson v Consumers Power Co*, 198 Mich App 82, 89-90; 497 NW2d 205 (1993); see also *Sampeer v Boschma*, 369 Mich 261, 266; 119 NW2d 607 (1963) ("This Court in prior decisions has repeatedly indicated its disapproval of attempts to claim prejudicial error based on some claimed irregularity to which no objection was made at the time").

Plaintiff's second issue on appeal is that the trial court erred in apportioning responsibility for payment of the guardian ad litem's fees. This Court reviews an award of costs for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002). Plaintiff objects to the trial court's apportionment of fees for the guardian ad litem based on his contention that the guardian ad litem was necessitated solely by defendant's actions and there existed no basis for altering the equal apportionment of the fees maintained prior to entry of the judgment of divorce.

The record demonstrates this was a highly contentious divorce proceeding with serious allegations made by both parties regarding the minor child. While the original role of the guardian ad litem was to oversee the necessity of medical treatment for the minor child, that role was expanded by consent of the parties to encompass resolution of parenting time issues. As the litigation progressed, the majority of the efforts by the guardian ad litem were directed at resolving disputes that arose through actions of both parties. The trial court apportioned costs incurred for the guardian ad litem in accordance with the child support guidelines based on the respective incomes of the parties. In addition, the trial court provided for a mechanism to adjust apportionment of the fees should either party be deemed by the guardian ad litem to be inappropriately utilizing his services. As a review of the record fails to reveal an abuse of discretion by the trial court, and given the income discrepancies that exist between the parties, the apportionment of fees should be affirmed. See *Sand v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

Plaintiff's final issue on appeal is that the trial court erred in failing to restrict contact between the minor child and the natural maternal grandfather based on the grandfather's prior drug conviction and reported history of abuse of defendant as a child. This Court reviews the factual findings of the trial court for clear error. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

Given the award of joint legal and physical custody of the minor child to both parties, the trial court determined it was appropriate to allow each parent to make decisions pertaining to the minor child's visitation and contact with third parties when the child was in their individual custody. When addressing the constitutionality of a grandparent visitation statute in *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000), the United States Supreme Court "emphasized the fundamental constitutional right of parents to raise their children and make decisions regarding visitation." See also *Greer v Alexander*, 248 Mich App 259, 265; 639 NW2d 39 (2002). The Michigan Supreme Court also recognizes the existence of a presumption that "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's child."

DeRose v DeRose, 469 Mich 320, 329; 666 NW2d 636 (2003), citing *Troxel*, *supra*, 520 US 68-69; see also *Heltzel v Heltzel*, 248 Mich App 1, 19; 638 NW2d 123 (2002). Consistent with its determination that defendant was a fit parent for the award of joint legal and physical custody of the minor child, the trial court properly deferred to defendant's right to determine the third parties permitted to associate with the child when the child is in defendant's custody.

Affirmed.

/s/ Kathleen Jansen

/s/ Patrick M. Meter

/s/ Jessica R. Cooper